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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAUL W. BERGSTROM, JOSEPH S. FRIEDBERG AND GREGORY J. SEMANKO,

Petitioners,

v.

THE DALKON SHIELD CLAIMANTS TRUST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to disallow unreasonable attorney's fees on funds distributed from the Dalkon Shield Claimants Trust?

2. Whether the limitation of fees to ten percent of a pro rata distribution of excess funds, requiring no effort by plaintiffs' counsel, exceeded the sound discretion of the district court?

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STATEMENT OF THE CASE

Petitioners are three of the 29 lawyers who appealed a district court order limiting attorney's fees from certain funds distributed by the Dalkon Shield Claimants Trust. These 29 lawyers had already received more than $90 million in fees from funds paid out by the Trust to resolve the claims of their clients. (Pet. App. 8a.) When it became clear that the Trust

would have money left over after resolving all claims, the Trust scheduled a pro rata distribution of excess funds to previously successful claimants. This additional payment would be made automatically, with no additional effort required of the claimants or of their lawyers. Accordingly, the district court limited attorney's fees to ten percent of the pro rata distribution.

Even with this limitation, the 29 lawyers who appealed below collected an additional $20 million in fees. (Pet. App. 9a.) Petitioners claim that this limitation should be set aside so that these 29 lawyers can collect instead an additional $66 million in fees for no additional work. The Fourth Circuit termed this claim a "wonderful example[] of chutzpah" (Pet. App. 31a) and suggested that the Trust should have cross-appealed the ten percent limitation of fees on the ground that it was unreasonably high. (Pet. App. 32a.) A brief review of this complicated litigation reveals the wisdom of the decision below.

A. Background.

This dispute is part of the A.H. Robins Co. bankruptcy case. The district court, sitting in bankruptcy, formulated a Reorganization Plan to process and pay hundreds of thousands of claims of injury from use of the Dalkon Shield. The Plan included an innovative Claims Resolution Facility (CRF), designed to provide "fair and equitable compensation ... to persons injured by the Dalkon Shield" by means of "an efficient economical mechanism for liquidating claims which favors settlement over arbitration and litigation, thereby reducing transaction costs ... ." (Pet. App. 1g.)

To that end, the CRF gave claimants three options. Most claimants chose Option 1, which encouraged quick settlement of trivial or frivolous claims by paying $725 on very minimal proof of Dalkon Shield use and injury. Option 2 was designed

for the relatively small number of claimants who had good proof of Dalkon Shield use and injury but whose medical records also revealed likely alternative causes for those injuries. Option 3 was designed for serious and provable claims. Under Option 3, a claimant submitted a claim form and her medical records and received an offer of compensation consistent with the historical settlement value of Dalkon Shield claims prior to the Robins bankruptcy. Claimants dissatisfied with those offers could proceed to alternative dispute resolution, arbitration, or litigation.

Option 3 proved enormously successful. Offers averaged 15 percent more than pre-bankruptcy settlements for comparable claims, and over 84 percent of the offers were accepted. Many other claims were resolved by alternative dispute resolution, a simplified procedure in which the Trust was not represented by lawyers. As a result, the huge majority of Dalkon Shield claims were resolved efficiently, economically, and with low transaction costs.

To an extent that could not have been foreseen at the outset, the claims resolution process minimized the role of lawyers. The claim forms were designed and tested to be readily comprehensible to all claimants, whether or not represented by counsel. The Trust issued newsletters and instructions and helped claimants complete forms and obtain medical records. Claims were evaluated under a highly structured, rule-based system, and the presence or absence of an attorney played absolutely no role in the valuation of claims. Most important, Option 3 settlement offers were non-negotiable. As the offers were "best and final" offers, not "low-ball" opening bids, counteroffers were neither entertained nor accepted. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 Fordham L. Rev. 617, 642-43 (1992).

These procedures dramatically reduced the role of lawyers. As they did not have to perform the full range of services that lawyers usually perform, recovery of standard contingency fees was unusually generous. As the district court found, "[t]hese lawyers, in general, have been paid handsomely considering the low risk levels involved in the generally routine and mechanical representation of Dalkon Shield Claimants." (Pet. App. 23c.)

Not only was the representation of Dalkon Shield claimants "generally routine and mechanical": it was also of doubtful benefit to the claimants. One would expect that claimants with more serious injuries (and hence the prospect of larger recoveries) would be more likely to be represented by counsel than claimants with less serious injuries. That may account for the fact that Option 3 settlements for represented claimants averaged $39,047, as compared to $33,150 for unrepresented claimants. With a one-third contingency fee, the average represented claimant retained only $26,031, significantly less than her unrepresented counterpart. On that comparison, Option 3 claimants received and kept an average of 27 percent more if they were not represented by counsel.

Whether represented or not, claimants who accepted offers signed releases acknowledging their settlements as full payment of all claims. Claimants who proceeded to alternative dispute resolution, arbitration, or litigation also received full compensation for all proven injuries. Petitioners' share of these recoveries has not been restricted. They received whatever contingency fees their clients agreed to pay, even though they functioned in a legal environment specifically designed to reduce the need for lawyers and even though the evidence suggests that they did not benefit their clients. They have indeed been "handsomely paid."

B. The Pro Rata Distribution.

The CRF provides that any excess money remaining after all claims have been resolved shall be distributed pro rata to all successful claimants who recovered more than de minimis amounts. Though no excess was expected in 1989, when the Trust was funded, by 1995 it had become clear that a substantial pro rata distribution would be made. The excess resulted from $800 million of investment income earned over the life of the Trust and from the Trust's spectacular success at controlling administrative costs, which were $200 million less than original forecasts. (Pet. App. 8c.) In 1995 the Trust therefore resolved to distribute to all claimants (except those who recovered only the $725 available under Option 1) payments equivalent to at least 75 percent of their awards. These pro rata payments would be made automatically, with no additional effort required of the claimants or their lawyers.

Having learned of these matters through routine reports on Trust operations, the district court issued an order announcing its intention to limit attorney's fees to 10 percent of the pro rata distribution and inviting any dissatisfied counsel to file motions for reinstatement. A copy of this "show cause" order was mailed directly to 10,894 lawyers listed on the Trust's records as representing Dalkon Shield claimants. The 29 lawyers who were parties below moved to vacate the disallowance of fees and appealed the denial of that motion to the Fourth Circuit, which affirmed. Three of that number now petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Even a cursory review of the history of this small aspect of the A.H. Robins bankruptcy reveals that it is no ordinary case. On the contrary, it has been, in almost every respect, extra-ordinary. In the words of the Fourth Circuit:

> This has been one of the most complex bankruptcy proceedings ever to come before a federal court and involves several hundred thousand claims from all over the world. The district judge and the bankruptcy judge have been sitting together in all matters arising under the Plan and the Trust and have been very diligent in their overall supervision of this case. They have expended great time and effort in trying to see that all valid claims are promptly paid. They have urged the attorneys into new areas and procedures in an effort to achieve the best results for those injured by the product. This has required the judges to be constantly aware of how successful the CRF has been in settling claims, how much money has been spent, how many claims remain, how the settlement options were working, whether the funds were going to be sufficient, what type of proof was being required to support the claims and thereby what type and degree of legal services were required of claimants' attorneys. Quarterly reports informed the court of the millions of dollars in fees being collected by attorneys without the risk usually accompanying products liability litigation. (Pet. App. 28a.)

Thanks largely to the diligence and oversight of the district court, the vast bulk of funds distributed in the Robins bankruptcy actually reached the injured claimants; they were not consumed by lawyers or by the expenses of administration. The good work of the district court and the court of appeals in achieving this remarkable result are certainly deserving of respect.

Petitioners' objections to the decision below entirely lack substance. First, petitioners claim that the district court lacked jurisdiction under 28 U.S.C. § 1334(b) to disallow unreasonable fees. The opinion below is persuasive to the contrary. The

A.H. Robins bankruptcy is the constitutional case or controversy. Under 28 U.S.C. § 1334(b) subject matter jurisdiction extends to "all civil proceedings ... arising in or related to" the bankruptcy case. According to the legislative history, "anything that occurs within a case is a proceeding"; the term is used "in its broadest sense." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). As the court below correctly held, the district court's order limiting fees is a proceeding both "arising in" and "related to" the Robins bankruptcy. (Pet. App. 18a-23a.)

Petitioners' assertion to the contrary misconceives the nature of the Robins bankruptcy. They claim that their collection of unreasonable fees would have no "effect on the estate being administered in bankruptcy" (Pet. 15), because the debtor no longer exists. Robins' assets were sold and the proceeds used to fund the Dalkon Shield Claimants Trust. Petitioners seem to believe that the sale of Robins' assets and transfer of their proceeds to the Trust ended bankruptcy jurisdiction, since nothing thereafter could affect the debtor. That is absurd. The Dalkon Shield Claimants Trust was created and now exists for one purpose only—to discharge the obligations of the debtor in bankruptcy. The bankruptcy case remains open until those obligations are fulfilled and the Trust is dissolved. Any proceeding that could affect the operation of the Trust is therefore "related to" the bankruptcy case under § 1334(b).*

The jurisdiction "question" therefore reduces to this: Is the disallowance of attorney's fees "related to" the administration of the Trust? The answer is, "of course." In the words of the

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* The Fourth Circuit has repeatedly so held in upholding the district court's supervision of the Trust. See, e.g., *In re A.H. Robins Co.*, 42 F.3d 870 (4th Cir. 1990); *In re A.H. Robins Co.*, 880 F.2d 769 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989); *In re A.H. Robins Co.*, 880 F.2d 779 (4th Cir. 1989).

court of appeals, "[t]he disallowance of excessive attorneys' fees to be collected from the unexpectedly large pro rata distribution is a matter related to the administration of the Trust because it affects the amount that each claimant will receive." (Pet. App. 21a.) The crucial fact is that the Trust does not exist to protect its own interests. Ultimately, it will keep nothing. The Trust exists only to protect the claimants, and its mission is to serve them. Any proceeding that may have an effect on the Trust's ability to vindicate the interests of the claimants and to reduce the transactions costs borne by them is "related to" the Robins bankruptcy case within the meaning of § 1334(b).

Petitioners also seem to think that the district court's power to disallow excessive attorney's fees exists only if each and every Dalkon Shield claimant initiates an attack on her lawyer's fees. (Pet. 17-21.) This argument ignores the role of the Trust in protecting the claimants' interests and the responsibility of the district court in supervising Trust operations. The crucial and obvious fact, as petitioners well know, is that *only* the Trust and the district court can protect Dalkon Shield claimants from overreaching by their lawyers. That they have done so is to be applauded, not condemned. As the Fourth Circuit noted, federal district courts have inherent power to disallow unreasonable attorney's fees. (Pet. App. 22a.)* Indeed, the Fourth

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* See *Allen v. United States*, 606 F.2d 432, 435 (4th Cir. 1979) ("the district courts' supervisory jurisdiction over contingent fee contracts for services rendered in cases before them is well-established"); accord, *Jackson v. United States*, 881 F.2d 707, 710 (9th Cir. 1989); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1114 (7th Cir. 1982); *Krause v. Rhodes*, 640 F.2d 214, 218-20 (6th Cir.), *cert. denied*, 454 U.S. 836 (1981); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 164-65 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982); *Dunn v. H.K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979).

Circuit thought this authority "so clear" that it was "not necessary discuss the additional sources of such authority such as the federal court's power to enforce state law standards of ethical conduct and a federal district court's inherent power to regulate the conduct of the court's officers, including attorneys." (Pet. App. 23a.) Given the undoubted factual basis for limiting attorney's fees in the pro rata distribution, the district court's action was, as the Fourth Circuit found, plainly within its sound discretion.

Petitioners other arguments are similarly without merit.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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